

Nos. 17-1618, 17-1623, and 18-107

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK,

v.

CLAYTON COUNTY, GEORGIA.

ALTITUDE EXPRESS, INC., *et al.*,

v.

MELISSA ZARDA, AS EXECUTOR OF THE
ESTATE OF DONALD ZARDA, *et al.*

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

v.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF
APPEALS FOR THE ELEVENTH, SECOND, AND SIXTH CIRCUITS

**BRIEF OF THE TREVOR PROJECT, PFLAG,
AND FAMILY EQUALITY AS *AMICI CURIAE*
IN SUPPORT OF THE EMPLOYEES**

RICHARD W. SMITH
DOUGLAS C. DREIER*
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
(202) 719-7000
ddreier@wileyrein.com

*Counsel of Record

Counsel for Amici Curiae

July 3, 2019

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT	4
I. DISCRIMINATION BASED ON BEING TRANSGENDER AND DISCRIMINATION BASED ON SEXUAL ORIENTATION ARE INSEPARABLE FROM SEX DISCRIMINATION.....	4
II. THE STORIES TOLD TO THE TREVOR PROJECT, PFLAG, AND FAMILY EQUALITY BY THE LGBTQ COMMUNITY DEMONSTRATE THAT THE ISSUE THEY FACE IS SEX DISCRIMINATION.....	9
CONCLUSION.....	15

TABLE OF CITED AUTHORITIES

Cases	Page(s)
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967).....	6, 7, 8
<i>McLaughlin v. Florida</i> , 379 U.S. 184 (1964).....	7
<i>Zarda v. Altitude Express, Inc.</i> , 883 F.3d 100 (2d Cir. 2018) (en banc)	7, 8
<i>Hively v. Ivy Tech Cmty. Coll. of Ind.</i> , 853 F.3d 339 (7th Cir. 2017) (en banc)	8
Statutes	
42 U.S.C. § 2000e-2	5
Va. Code. § 20-59.....	6
Other Authorities	
Brad Sears & Christy Mallory, <i>Documented Evidence of Employment Discrimination & Its Effects on LGBT People</i> , WILLIAMS INSTITUTE, 2 (2011) https://williamsinstitute.law.ucla.edu u/wp-content/uploads/Sears-Mallory- Discrimination-July-20111.pdf	4, 5

INTEREST OF *AMICI CURIAE*¹

The Trevor Project, PFLAG, and Family Equality respectfully submit this *amici curiae* brief in support of the employees—namely, Petitioner in No. 17-1618, Respondent in No. 17-1623, and Respondent-Intervenor in No. 18-107.

The Trevor Project is the nation’s largest lesbian, gay, bisexual, transgender, queer, and questioning (“LGBTQ”) youth crisis intervention and suicide prevention organization. Founded in 1998, The Trevor Project offers the only national accredited, free, and confidential phone, instant message, and text messaging crisis intervention services for LGBTQ youth. The Trevor Project also hosts a social networking site called TrevorSpace that allows LGBTQ youth to connect with one another. These services are used by thousands of individuals each month. By monitoring, analyzing, and evaluating data obtained from these services, The Trevor Project produces innovative research, developing new knowledge and clinical implications for issues affecting LGBTQ youth. The Trevor Project also provides training and other educational resources to youth-serving professionals, such as counselors,

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than The Trevor Project, PFLAG, and Family Equality, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, either by providing blanket consent or by providing written consent to *amici curiae*.

educators, and school nurses, to teach them how to act as allies to support LGBTQ youth. In addition, The Trevor Project's Youth Ambassador Council consists of bright LGBTQ youth who give back to their communities and serve as role models for their peers.

PFLAG, founded in 1972 with the simple act of a mother publicly supporting her gay son, is the nation's first and largest organization uniting families, allies, and LGBTQ people. With more than four decades of experience providing support, education, and advocacy, PFLAG has more than 400 chapters and 200,000 members and supporters crossing multiple generations of families in major urban centers, small cities, and rural areas across the United States.

Family Equality (formerly, "Family Equality Council") is a national organization that advances lived and legal equality for LGBTQ families and those who wish to form them, including the United States' three million LGBTQ parents and their six million children. Since its founding in 1979, Family Equality has worked through advocacy and public education to ensure that all families, regardless of creation or composition, are respected, loved, and celebrated in all aspects of their life. Through Family Equality's Family Speak Out programs, LGBTQ parents, their children, and their parents speak out about their families, share their stories, and become advocates for family equality.

Amici curiae have a substantial interest in opposing discrimination against members of the LGBTQ community they serve. They have worked

firsthand with the LGBTQ community for decades, thereby developing significant expertise on the issues that affect members of the community. They have witnessed the devastating effects that discrimination has on LGBTQ people and their loved ones and have heard countless stories demonstrating beyond a doubt that discrimination against members of the LGBTQ community is necessarily discrimination based on sex.

SUMMARY OF THE ARGUMENT

The Trevor Project, PFLAG, and Family Equality have stood alongside the LGBTQ community in times of crisis. They have heard their stories, listened to their struggles, comforted them in the face of discrimination, and worked to ensure their legal and lived equality. They have provided a forum for LGBTQ individuals and their family members to describe the issues that they are confronting and to find ways to persevere.

These stories confirm that no matter the form of the discrimination, no matter the circumstances behind each case, discrimination against LGBTQ people is sex discrimination. A transgender woman is discriminated against because she does not look like or act like the man that persecutors think she should be or, conversely, because others think she does not look or act the way they think a woman should. A gay man is discriminated against because he does not look or act the way his employer, his teacher, his family, or his peers think he should look or act.

When LGBTQ individuals, their families, and their friends seek help from The Trevor Project, PFLAG, and Family Equality, they tell their stories, and their stories are clear. There is no way to dissociate discrimination based on being transgender or discrimination based on sexual orientation from discrimination based on sex. Any attempt to treat these types of discrimination as three distinct categories is doomed to fail and wrongly would deprive LGBTQ Americans of the protections against sex discrimination—in all its forms—that Title VII was enacted to provide to all.

ARGUMENT

I. DISCRIMINATION BASED ON BEING TRANSGENDER AND DISCRIMINATION BASED ON SEXUAL ORIENTATION ARE INSEPARABLE FROM SEX DISCRIMINATION.

LGBTQ individuals across the United States want and deserve the same basic rights that their peers have—rights to provide for themselves and their families and to advance their careers. And they want and deserve the freedom to achieve those goals without thumbs pressed firmly on the scale against them.

Too often, however, LGBTQ individuals suffer discrimination in employment. In one survey of lesbian, gay, and bisexual Americans, approximately 42% reported being the victims of employment discrimination because of their sexual orientation. Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT*

People, WILLIAMS INSTITUTE, 2 (2011) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf>. And employment discrimination is a nearly universal reality for transgender individuals, with approximately 78% reporting that they have faced harassment or mistreatment at their work because they are transgender. *Id.* at 11.

LGBTQ employees are asking this Court to affirm that the employment discrimination they face is discrimination based on sex and is, therefore, prohibited by Title VII. *See* 42 U.S.C. § 2000e-2. The text of Title VII prohibits an employer from discriminating against an individual because of certain aspects of an individual's identity. One of those protected aspects is an individual's "sex." 42 U.S.C. § 2000e-2(a)(1).

At its core, discrimination against LGBTQ individuals is rooted in notions of how men and women are supposed to look, act, and carry themselves and who they are supposed to love. There is a reason why The Trevor Project, PFLAG, Family Equality, and many leading LGBTQ advocacy groups serve the entire LGBTQ community, notwithstanding the differences in the issues facing each part of the community. When lesbian, gay, and bisexual Americans are discriminated against based on their sexual orientation, it is because of their sex and the sex of the person that they love or because they do not meet societal expectations of how men and women should look, act, or carry themselves. When transgender Americans are discriminated against, it is because of the perceived gap between their assigned

sex at birth and their gender identity or because they do not meet societal expectations or norms for men and women.

To understand the inextricable intertwining of sex discrimination and discrimination based on being transgender or on one's sexual orientation, it helps to first consider discrimination based on race in a separate context where the Court reached unanimity. Flash back to 1967: this Court unanimously ruled that a Virginia law prohibiting "any white person [from] intermarry[ing] with a colored person, or any colored person intermarry[ing] with a white person" violated the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 5 (1967) (quoting Va. Code. § 20-59). The Court rejected Virginia's "equal application" theory, which posited that Virginia's anti-miscegenation statutes applied equally to the races and were, therefore, not a violation of the Fourteenth Amendment. *See id.* at 11 ("There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race."). The problem, as the Court understood it, is that Virginia had classified individuals based on their race and then imposed prohibitions on them as a result of their race. *Id.*

The Court could conceivably have reached a different result. Virginia argued that its anti-miscegenation law applied to the races equally. In its brief, the Commonwealth quoted from Senator Lyman Trumbull of Illinois, who had introduced the Freedmen's Bureau Bill in 1866, which was the forerunner to the Civil Rights Act of 1866 and the Fourteenth Amendment:

Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and vice versa? I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races. *This bill does not interfere with it.* If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain.

Brief of Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *16 (emphasis in original).

The employers are now recycling the same weak and baseless argument from *Loving*, an argument further rejected by this Court in *McLaughlin v. Florida*, 379 U.S. 184 (1964). Their argument is that the discrimination before the Court applies to the sexes equally, with the only difference from *Loving* or *McLaughlin* being the substitution of the races for the sexes. For instance, in a dissent in *Zarda v. Altitude Express, Inc.*, after writing that an employer who discriminates on the basis of sexual orientation is “expressing disapproval of the behavior or identity of

a class of people that includes both men and women,” Judge Lynch urged: “The belief on which [disapproval of same-sex relationships] rests is not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do—to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex.” 883 F.3d 100, 158 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (emphasis in original); *see also Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 365 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (“[S]exual-orientation discrimination doesn’t classify people by sex; it doesn’t draw male/female distinctions but instead targets homosexual men and women for harsher treatment than heterosexual men and women.”). A similar syllogism could easily have appeared in a dissent in *Loving*: The belief on which the anti-miscegenation law rests is not a belief about what people of one race ought to be or do; it is a belief about what *all* people ought to be or do—to be attracted to members of the same race, and to have sexual attraction to or relations with only members of the same race. But in both cases, the discrimination depends upon the race or the sex of the individuals.

Today, there is no question that anti-miscegenation laws discriminate based on race, even if the framers of the Fourteenth Amendment did not think so in the 1860s. It is time for the Court to join with the lower courts and carry the same logic forward. Discrimination based on sexual orientation and discrimination based on being transgender are inescapably sex discrimination. Discrimination is occurring because someone of one sex is attracted to or partnered with someone of the same sex and

transgressing the “rules” that some segment of society established for people of that sex. Discrimination is occurring because someone of one sex does not act or look or think like people of that sex are “supposed” to act or look or think. Title VII’s ban on sex discrimination prohibits this.

II. THE STORIES TOLD TO THE TREVOR PROJECT, PFLAG, AND FAMILY EQUALITY BY THE LGBTQ COMMUNITY DEMONSTRATE THAT THE ISSUE THEY FACE IS SEX DISCRIMINATION.

The Trevor Project, PFLAG, and Family Equality have supported the LGBTQ community for decades. Each year, thousands of LGBTQ individuals contact The Trevor Project in a state of crisis, which is often either caused or exacerbated by the discrimination or harassment they have suffered. The Trevor Project offers several different methods for people in crisis to contact a trained counselor. TrevorLifeline is a telephone counseling service that LGBTQ youth can call for support in times of stress and trouble; likewise, TrevorChat and TrevorText are online chat and text messaging services, respectively. The Trevor Project also hosts a social networking site called TrevorSpace that allows LGBTQ youth to connect with one another. Likewise, LGBTQ individuals and their family members reach out to PFLAG and Family Equality to discuss the discrimination they and their loved ones have suffered. For instance, Family Equality’s Outspoken Generation, part of its Family Speak Out Programs, allows children of same-sex couples and LGBTQ parents to speak out about their families, share their stories, and talk about the

discrimination they have suffered. Family Equality collects stories of LGBTQ families and children, including reports of discrimination, to further its education, policy, and *amicus* work.

Many individuals who contact *amici curiae* report that they or their loved ones have been harassed at work or terminated because they are LGBTQ. Their stories confirm that the discrimination they suffer is based on their employers' view of how people should act based on their sex. In what follows, *amici curiae* provide the Court with ten anonymized excerpts of these discussions to demonstrate directly how discrimination based on sex plays out in the workplace for members of the LGBTQ community.²

All of these stories share a common theme. LGBTQ children and adults, and people perceived to be LGBTQ, are suffering discrimination because of others' views of how they should look, act, or think based on their sex. They are first classified as men or women, and then they are persecuted for not conforming to certain ideals of how men or women should look, act, or simply be. These sexist ideas should not prevent them from employment free from harassment and discrimination, as required by Title VII of the Civil Rights Act and consistent with the rulings of several lower courts.

First, a transgender man in contact with Family Equality was turned away on the first day of his job

² *Amici curiae* have anonymized these real stories, which are on file with counsel, to protect the identities of these individuals.

because of the sex listed on his driver's license. The man had successfully interviewed for a position at a restaurant, and he was brought in to start his training and fill out his employment paperwork. As part of his paperwork, he had to show his driver's license to his employer, and his driver's license stated that he was female. Upon seeing his driver's license, the restaurant sent him home. Later, the restaurant told him that he could not work for the restaurant because of "discrepancies" about his identification. The restaurant had no objections to the man during his interview, but when they found out that his assigned sex at birth had been female, they revoked their offer of employment.

Second, in the same vein, a transgender woman shared with Family Equality that after several weeks on the job, her boss noticed that her driver's license listed her sex as male, and he outed her as transgender in front of all her coworkers in a clear attempt to humiliate her and then he fired her. As a result of losing her job, she lost her house and car and ultimately became homeless. In both cases, the discrimination that these transgender individuals suffered was based solely on the sex listed on their driver's licenses. Having secured the positions as they presented themselves (consistent with their gender identity), there can be no suggestion that either individual was deemed not to meet the criteria for their jobs. Rather, they were fired because they did not outwardly embody the sex that they were assigned at birth, as described by the gender marker printed on a government-issued document.

Third, a high school student reached out to The Trevor Project to try to help a transgender friend who was being violently bullied at the restaurant where he worked. They threw things at him, called him names, and refused to refer to him as a man because they disapproved of his not presenting in accord with his assigned sex at birth. Because he was too afraid to reach out for help, the caller went to his manager on his behalf. Rather than take any action to protect his employee, the manager demurred and said that he would need more information before he would be willing to take action.

Fourth, a transgender PFLAG member worked as a high-level executive at an international hotel chain. As part of the hotel's global diversity program, he eventually disclosed that he was transgender. His boss expressed anger at the revelation and promptly fired him. As a result of his boss's discriminatory views and actions, this transgender man was forced to tell his mother, for whom he was the sole provider, that he had been terminated from his job and might not be able to care or provide for her without outside assistance.

Fifth, a beloved public high school teacher with a strong performance record and glowing recommendations, in contact with Family Equality, was fired for being a lesbian. Although she had worked for the school district for a few years and never disclosed her sexual orientation, school administrators learned that she had a longtime female partner after a community member casually mentioned it at a funeral where several students, parents, and school staff were in attendance. Days

later, her superintendent informed her that her contract would not be renewed because there were “questions” about her sexual orientation. Had the teacher had a male partner, she would not have been fired.

Sixth, a transgender woman shared with Family Equality that she experienced two forms of employment discrimination – first a hostile work environment and then her constructive discharge. She began working at a pub in the early stages of hormone replacement therapy. A coworker there proudly admitted to viciously punching a man in the face for kissing another man. Because the employee’s appearance had not yet visibly begun to change, the violent coworker did not direct his anger at her, but she felt fearful as to what might occur in time. With nobody to turn to, and for fear of violence, she was forced to quit her job and began to work at a bakery. When she began growing out her hair and presenting as more outwardly feminine, her manager at the bakery rolled out a new policy that required male employees to wear their hair short. When she told her manager that she was transgender, her manager, as well as the bakery’s executives, informed her that the bakery does not hire her “kind” of people and that she must quit, thereby causing a second constructive discharge.

Seventh, a transgender teenager called into TrevorLifeline because they were facing harassment at the fast-food restaurant where they worked. When their boss decided to reinstate gendered toys—with boys receiving toy trucks and girls receiving dolls—the employee suggested that the store should not

reinstate the policy. Their boss responded by telling them to be more like a girl and heckling them for cutting their hair short. Their boss refused to call them by the pronouns they use (they/them/their), and they were constantly misgendered at work. The discrimination the employee faced cannot be divorced from sex discrimination. They were not acting the way that their boss believed a girl should act. They had a haircut shorter than what their boss believed a girl should have. Their interests were not limited to those that are stereotypically considered as “feminine.” The discrimination they faced is unquestionably discrimination based on sex.

Eighth, a PFLAG member’s daughter coached a sports team at a major university. When the coach told her players that she was having a baby with her female partner, the university asked her to resign. Had she been partnered and raising a child with a man, the university would have permitted her to continue to coach her team, but because she was partnered with a woman, she had to put an end to that winning career.

Ninth, a gay high school student called TrevorLifeline because people had mocked his voice for being too feminine. Understandably, their comments made him feel insecure and disrespected. He worried that he would be discriminated against his whole life because he did not live up to certain people’s ideas about how a man should be and that he would never be successful in corporate life. His concerns echoed those of a transgender woman who called TrevorLifeline because she had been working hard to make her voice sound more feminine, but her

voice still did not sound the way some people expected it to sound. She wanted to take voice therapy lessons to make her voice sound more like a “traditional” woman so that people would not discriminate against her in the workplace for not seeming sufficiently feminine.

Tenth, a straight woman contacted TrevorChat after she was insulted at work for being perceived as either a lesbian or transgender when in fact she is neither. She was called a derogatory term used for lesbians and then another person questioned her gender and referred to her as “it.” When incidents like this take place in the workplace, it has a profound effect on employees. It makes them feel unsafe, unsupported, and often unable to focus on the task at hand—all because of sexism. The motivation for these hurtful comments was that this straight woman was not dressing the way that a woman should dress. The sexism, homophobia, and transphobia cannot be distinguished.

CONCLUSION

For the foregoing reasons, and those set forth in the Briefs, the Court should rule in favor of the employees. The Court should affirm the judgment of the U.S. Court of Appeals for the Sixth Circuit in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (U.S.), and the judgment of the U.S. Court of Appeals for the Second Circuit in *Altitude Express, Inc. v. Zarda*, No. 17-1623 (U.S.), and the Court should reverse the judgment of the U.S. Court of Appeals for

the Eleventh Circuit in *Bostock v. Clayton County, Georgia*, No. 17-1618 (U.S.).

Respectfully submitted,

Richard W. Smith
Douglas C. Dreier*
**Counsel of Record*
WILEY REIN LLP
1776 K Street N.W.
Washington, D.C. 20006
(202) 719-7000
DDreier@wileyrein.com

Counsel for Amici Curiae
July 3, 2019